

KHASRIA (Migration) [2020] AATA 1458 (11 February 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr NARINDER PAL SINGH KHASRIA

CASE NUMBER: 1905260

DIBP REFERENCE(S): BCC2019/160466

MEMBER: Amanda Upton

DATE AND TIME OF ORAL DECISION AND REASONS: 11 February 2020 at 10:54 am (VIC time)

DATE OF WRITTEN RECORD: 2 April 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision under review.

Statement made on 02 April 2020 at 3:21pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – change of circumstances – member of family unit – spouse – divorce – discretion to cancel visa – applicant wants to reconcile, no evidence that ex-wife wants to – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 116(1)(a)
Migration Regulations 1994 (Cth), r 1.12

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 February 2019 to cancel the applicant's Subclass 500 Student (Temporary) (Class TU) visa under the *Migration Act 1958* (the Act).
2. At the hearing on 11 February 2020 the Tribunal made an oral decision and gave an oral statement of decision and reasons. The following is the written record of those reasons.

STATEMENT OF DECISION AND REASONS

3. This is an application for a review of a decision dated 27 February 2019 made by a delegate of the Minister for Home Affairs to cancel the applicant's subclass 500 student visa under section 116 of the Migration Act.
4. The delegate cancelled the visa under section 116 (1)(a) on the basis that the decision to grant the visa was based wholly or partly on a particular fact or circumstance that is no longer the case or that no longer exists. That is that the visa was granted because the applicant met, among other criteria, the secondary criteria for the visa on the basis he was a member of the family unit of Ms Kretiki Dawa, pursuant to regulation 1.12 of the Migration Regulations.
5. The applicant was granted his dependent visa on the basis that he was a member of a family unit of the primary visa holder, Ms Dawa. And he was determined to be in a genuine and continuing relationship with her. The issue in the present case is whether that grant for cancellation is made out and if so, whether the visa should be cancelled.
6. The applicant appears before the tribunal on 11 February 2020 to give evidence and present arguments. The tribunal hearing conducted with the assistance of an interpreter in Punjabi and English languages. For the following reasons, the tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.
7. Under section 116 of the Act, the Minister may cancel a visa if he or she is satisfied that the certain grounds specified in that provision are made out. Relevantly to this case, these include the grounds set out in section 116(1)(a). If satisfied that the ground of cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances which may include matters of government policy.
8. A visa may be cancelled under section 116(1)(a) if the Minister is satisfied that the decision to grant the visa was based wholly or partly on a particular fact or circumstance that is no longer the case, or no longer exists. The applicant was previously in a relationship and married to Ms Dawa, the primary visa holder. A divorce order concerning the applicant and Ms Dawa came into effect on 8 November 2018.
9. The applicant concedes that he is divorced. The applicant has not lived with the primary visa applicant since around July 2017, five to six months after arrival in Australia. The Tribunal considers that the applicant is no longer in a genuine and continuing relationship with Ms Dawa. He is no longer married to her and he is not in a de facto relationship with her.
10. For these reasons, the tribunal is satisfied that the grounds for cancellation exist. As that ground does not require mandatory cancellation under section 116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

11. For these reasons, the Tribunal is satisfied that the grounds for cancellation in section 116(1) (a) exist as that ground does not require mandatory cancellation under section 116(3).
12. The Tribunal must proceed to consider whether the visa should be cancelled. There are no matters specified in the Act or Regulations that must be considered in the exercise of discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant and matters in the department's procedures advice manual. The applicant has told the tribunal that it was his ex-wife who filed for divorce; he did not have to go to court.
13. He detailed to the Tribunal that he was called to meet in a shopping centre to find the divorce form, but he refused to do so. He indicates that his ex-wife told him through a phone call of the divorce and his lawyer told me in November – told him in November of 2019. The Tribunal notes however, that the divorce order came into effect in November of 2018.
14. And also, that the applicant stopped living with his wife five to six months after arrival in Australia. With respect to the applicant's purpose of travel, the applicant came to Australia as a dependent on his wife's student visa. The purpose of his travel to accompany his wife in Australia while studying. The applicant has told the Tribunal that his purpose now for wanting to stay is to patch up things with his ex-wife.
15. However, the Tribunal notes that that relationship has been broken down since approximately July 2017 and there is a divorce order in effect. The purpose for the grant of the applicant's visa to travel with his wife is no longer applicable. His purpose now to remain in Australia is to reconcile with his wife. There is no information before the Tribunal to indicate that his ex-wife wants to participate in such reconciliation.
16. The Tribunal notes that it was her who filed for divorce and the applicant has indicated to the Tribunal that she does not want to live with him. The applicant wants to remain in Australia in order to try and patch up. The Tribunal gives this consideration weight in favour of cancelling the visa.
17. With respect to the extent of compliance, the applicant has not been living with the visa holder since July 2017. So at worst, the basis of the visa grant has not been in existence since that time. At best however, it could be considered that the extent of the compliance is from November of 2018 when the divorce order came into effect.
18. The Tribunal considers the compliance – the non-compliance for the basis of the visa to be from November 2018 which gives the benefit of the shorter period of time to the applicant. Even so, the Tribunal considers the extent of the compliance to be significant. The relationship breakdown occurred a number of years ago now, there is a divorce order and no indication that the applicant's ex-wife wants to reconcile.
19. The Tribunal gives this consideration weight in favour of cancelling the visa. The circumstances under which the cancellation arose are that the applicant was divorced from his wife from November of 2018. And as the Tribunal notes, there is nothing before the Tribunal to indicate that this is not an enduring circumstance or that his ex-wife would like to reconcile.
20. The applicant has been quite clear that he does wish to reconcile.

21. It seems quite obvious to me that you do wish to reconcile with her. The Tribunal considers that there is nothing in relation to the circumstances which are – that were out of the applicant's control. Nor are there any circumstances that have been raised which would give weight in favour of not cancelling the visa.
22. While there are no other visa holders relevant to the applicant, there are no children of the relationship, so the Tribunal does not give this consideration any weight in favour of cancelling or not cancelling the visa. With respect to the hardship that the applicant may experience if his visa is cancelled, the applicant has told the Tribunal that he would be embarrassed to go back to his community without his ex-wife with him.
23. Her family don't know that they had a divorce and he would like her to go back with him so everyone can know all together. Whilst the Tribunal understands that emotionally these things are difficult for the applicant, the Tribunal considers that these are more likely to be associated with the breakdown of the relationship rather than a cancellation of a visa.
24. The Tribunal notes that if the applicant's visa was to be cancelled, it may cause him difficulty coming back to Australia where his ex-wife is. And the Tribunal considers that if, in the future, his ex-wife wishes to attempt to reconcile, noting that there is no evidence of that at this point, not being able to obtain a visa to come back and visit her may cause the applicant hardship.
25. Given this, the tribunal gives some weight in relation to this, in favour of not cancelling the visa. There is nothing to indicate that the applicant has behaved adversely towards the department and therefore, the Tribunal gives that consideration little weight in favour of not cancelling the visa.
26. The applicant has indicated that he is from India, that he still retains his passport and there is no legal reason that he could not go back to India. If the visa was cancelled, the applicant would no longer have visa status to allow him to remain and will become an unlawful non-citizen. And as an unlawful non-citizen, he may be liable for detention and removal from Australia.
27. However, given that the applicant still holds his passport and there is no impediment for him returning to India, the Tribunal does not give this consideration any weight in favour of the applicant. No breach of international obligations has been raised on behalf of the applicant and therefore, the Tribunal does not give this consideration any weight.
28. Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled. The Tribunal affirms the decision to cancel the applicant's subclass 500 student visa.

DECISION

29. The Tribunal affirms the decision under review.

Amanda Upton
Member